FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1051

HARVEY ROSENBERG, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINION BELOW

The Court of Appeals for the Second Circuit did not issue an opinion. The opinion of the United States District Court for the Southern District of New York denying the petitioner's motion to dismiss the indictment, Appendix C, pp. 2a-4a, *infra*, is unreported.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, p. 1a, *infra*) was filed on November 13, 1972, and an order denying a petition for rehearing (Appendix

B, pp. 1a-2a, *infra*) was filed on November 29, 1972. On December 20, 1972, Mr. Justice Marshall granted an order extending the time to file a petition for a writ of certiorari to and including January 29, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant may be charged and convicted of perjury in denying to a grand jury that he had made certain oral statements to Government investigators, where his full testimony before the grand jury demonstrates that he told the grand jury he did not *remember* whether he had made any such statements.

2. Whether this Court's decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972), compels dismissal of an indictment for failure to provide a speedy trial where a *six year* lapse between indictment and trial was due principally to what the District Judge found to have been an "inexcusable delay" by the prosecution of more than two years in serving a bill of particulars, and more than three years in complying with other provisions of the Judge's pretrial order.

STATUTE INVOLVED

18 U.S.C. § 1621 provides in relevant part as follows:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material

matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner is an attorney who has practiced law since 1950 in the District of Columbia and its Maryland suburbs. He was convicted by a jury in the United States District Court for the Southern District of New York on a one-count indictment charging him with committing perjury before a grand jury in 1965, and was sentenced to a suspended term of one year's imprisonment. The United States Court of Appeals for the Second Circuit (Smith, Kaufman, and Mulligan, JJ.) affirmed without opinion.

The events giving rise to the petitioner's indictment began in July 1964, when he represented one Arnold Romano, who had been arrested in the District of Columbia on a federal narcotics charge. After a bail hearing before a United States Commissioner in the District of Columbia, petitioner deposited $30,000 with a bondsman in the District of Columbia, and Romano was released on bond.

Romano was subsequently indicted in the Southern District of New York and was ordered removed after another United States Commissioner's hearing at which petitioner represented him. On April 27, 1965, when a calendar call on the case was set in the Southern District of New York, Romano did not appear. An investigation was begun by the Bureau of Narcotics, and pursuant to that investigation two Narcotics agents communicated with an acquaintance of Ro-

mano's named Muriel Block. Miss Block agreed to be interviewed at the offices of the petitioner, who was her attorney.

The interview was held on April 30, 1965. In a report of the interview dated May 6, 1965, one of the agents stated that he had asked petitioner some questions on concluding the interview with Miss Block. The questions pertained to petitioner's receipt of the $30,000 used as security for Romano's bond, and, according to the agent, petitioner responded by telling the agent that the money had come to him after a telephone conversation with Romano's New York attorney.

On May 18, 1965, petitioner appeared pursuant to invitation before the federal grand jury in the Southern District of New York and was asked about his services for Romano and his receipt of the $30,000. (He was *not* asked on this occasion—or on the next five appearances he made before the grand jury—about the statements he allegedly made to the Narcotics agents, even though the prosecutor had the Narcotics agents' report of May 6 in his possession.) Petitioner invoked the attorney-client privilege in response to many questions relating to the $30,000. Five grand jury sessions ensued over the following month-and-a-half, during some of which the Hon. John M. Cannella, U.S.D.J., presided over the questioning of petitioner before the grand jury in the presence of several Assistant United States Attorneys (with petitioner's counsel excluded). On July 14, 1965, his seventh appearance before the grand jury (at the 270th transcribed page of his grand jury testimony), petitioner was asked, for the first time, about the interview conducted by the

Narcotics agents. The first question and answer on the subject was:

> Q. Did the agents discuss with you on this occasion the thirty-thousand-dollar bond that was posted.
> A. I don't recall whether they did or not.

Shortly thereafter, petitioner was again asked:

> Q. Do you recall whether, in the conversation between the agents and Miss Block, the subject of the thirty thousand dollars came up?
> A. No, I don't. I really don't.
> Q. You don't recall that.
> A. [Shakes his head]
>
> * * * * * * *
>
> Q. Did the agents, do you recall, ask you about the thirty thousand dollars?
> A. I don't recall Mr. Tend—Mr. Obermaier—I really don't . . . .

Despite petitioner's unqualified statements that he did not remember any conversation with the two agents concerning the $30,000 that he had posted for Romano, questions were repeatedly directed to him concerning such a conversation. Petitioner's answers to five of those questions became the subject of his indictment. Excerpts from that questioning are as follows (the questions and answers quoted in petitioner's indictment are in italics):[1]

> Q. Did you tell the agents that you had no personal knowledge of the thirty-thousand dollars?
> A. I don't think they asked me any questions

[1] The entire series of questions and answers on this subject, which occupies fifteen pages of the grand jury transcript, is reproduced in Appendix D *infra*, at pp. 5a-15a.

about the thirty-thousand dollars. I don't remember any.

* * * * * * *

Q. But you have no present recollection?

A. No, because they didn't come to talk to me, and my whole reason for being there was to assist Miss Block . . . .

* * * * * * *

Q. And you recall nothing in the conversation between Wurms and yourself, concerning the thirty-thousand dollars?

A. No, sir. I really don't.

* * * * * * *

Q. But the agents asked you nothing about the $30,000?

A. Not to my recollection, they didn't. They didn't come to talk to me. They came to talk to Miss Block.

Q. That's not what I'm asking you.

A. I don't recall anything about the $30,000 ever being asked me.

* * * * * * *

Q. Did you tell Agent Wurms that you received a telephone call from Markowitz concerning the $30,000?

A. I don't recall any such conversation.

Q. Well, would such a conversation have been had between you and Wurms, that you—

A. I doubt it.

Q. You know you had no personal knowledge as to how you obtained the $30,000?

A. That's right, sir.

Q. *Didn't you tell Agent Wurms that Markowitz, during the telephone conversation, told you that he was sending down $30,000 by messenger?*

A. *No, because that's not what happened.*

Q. You didn't tell the agent that?

A. [Shakes head, no.]

Q. Is there any doubt in your mind that you had no such conversation, even approaching that subject?

A. I don't recall any such conversation, Mr. Obermaier. Anything would be possible, but that did not happen. Mr. Markowitz did not, to my knowledge, and even to my present knowledge,—well, now,—you're getting—

Q. Well, did you tell the agents that Markowitz called you?

A. Did I tell the agents Markowitz called me?

Q. And told you that he was sending down $30,000 in cash?

A. I don't think so. I don't know. I don't recall any such conversation.

* * * * * * *

Q. Did you talk to Romano about the receipt of the $30,000?

A. Did I? I think that's privileged communication.

Q. Did you talk to the agents about that?

A. Not to my knowledge. I wouldn't tell them anything that's privileged.

* * * * * * *

Q. Well, you certainly weren't acting in an attorney's capacity with respect to the $30,000.

A. Well, look, first of all the facts are, when I got the $30,000, I called the bonding company and I got Mr. Romano out, so I certainly wouldn't have gone down to the jail with the $30,000.

Q. That's not my question; not even close to my question. I asked, did you go down to Romano with respect to a receipt for $30,000?

A. No, sir.

Q. *Did you tell the agents that you went down to the District jail to talk to Romano about a receipt for $30,000?*

A. *Not to my knowledge, because it never occurred—*

Q. Did you tell the agents that Romano told you that you should sign the receipt for the $30,000 and give it to Senge?

A. No, sir, because I wouldn't be signing a receipt for $30,000 I gave away.

* * * * * * *

Q. Did you tell the agents that you signed a receipt for the $30,000?

A. No, sir.

Q. Did you tell the agents that you could produce that receipt, if it was necessary?

A. No, sir; there is no such receipt.

* * * * * * *

Q. You didn't tell the agents that you signed a receipt for the $30,000?

A. You know,—I don't know what the agents have said, but I did not discuss this matter with the agents.

Q. At all?

A. No; my recollection, no. And I could not have told them there was a receipt, because there is no receipt.

Q. And you could not have told them that you went down to Romano in the District jail, to discuss the $30,000 receipt, did you?

A. No, sir, because I got Mr. Romano out within six hours of having received the money. I didn't go to the jail.

* * * * * * *

Q. Did you tell Agent Wurms that you had such a conversation?

A. I have no recollection about a conversation with Agent Wurms about the $30,000. I have absolutely no recollection about it at all because the only reason he was in my office was to talk to Miss Block.

Q. You have no recollection that you had this conversation?

A. My testimony is I have no recollection of it whatsoever.

On January 20, 1966, petitioner was charged with perjury by the same grand jury before which he had testified, in a two-count indictment filed in the Southern District of New York.[2] The first of the two counts quoted testimony given by him to the grand jury on five dates in which petitioner had denied knowledge of the source of the $30,000 used as collateral. The second count related to the testimony quoted above concerning his discussion with Narcotics agents.

A motion was filed by the petitioner to dismiss the indictment on the ground, *inter alia,* that the participation of a District Judge in the grand jury proceeding violated his right not to have unauthorized persons in the grand jury room. On October 27, 1966, while that motion was pending and after it had been argued, the present superseding indictment in one count was filed by another grand jury. This indictment charged *only* that petitioner had lied in answering the five questions italicized above and omitted all the questions and answers which preceded and followed the five selected. The prosecution filed a *nolle prosequi* on the earlier two-count indictment.

Motions to dismiss and for discovery were filed by the petitioner a little more than two months after the indictment was entered. On June 1, 1967, the Hon. Irving Ben Cooper, U.S.D.J., filed a Memorandum Opinion denying the motion to dismiss and granting a request for certain particulars and other discovery. By March 20, 1968—almost ten months after Judge

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[2] The Narcotics agents—whose version of the conversation with petitioner is said to have been material to the grand jury's investigation—did not testify before the grand jury until January 20, 1966. Obviously, the only purpose of their testimony was to indict petitioner.

Cooper's order—no bill of particulars had been served by the prosecution and it had failed to make the discovery required by the Judge's order. Petitioner's counsel thereupon moved for dismissal of the indictment. The motion was thereafter adjourned by stipulation, but petitioner's counsel, in the letter agreeing to the first adjournment, specified that the government was to "give us information required by Judge Cooper within thirty days" (A. 238).[3]

On July 8, 1969,—25 months after Judge Cooper's order—the prosecution served a two-and-one-half page bill of particulars. The other two discovery instructions were still not complied with, and on October 26, 1970, petitioner's counsel again moved to dismiss the indictment for want of a speedy trial. In reply, the government submitted an affidavit of an Assistant United States Attorney who stated that he had been assigned the case in *August 1970,* and that there had been no undue delay on his part.

Judge Cooper denied the motion to dismiss on February 8, 1971, although he found (pp. 2a-3a, *infra*) that the prosecution was guilty of "a clear failure within a reasonable time to comply with our order of June 1, 1967." He added: "[W]e are at a loss to understand the inordinate time it permitted to pass; even at this late hour it offers no satisfactory reason." He also concluded that there was "inexcusable delay on the Government's part," but believed that certain limited additional discovery and the setting of a trial date for the fall of 1971 sufficed to overcome this failing.

Prior to trial—which began on January 25, 1972—petitioner's attorney filed another motion to dismiss

[3] "A." refers to the Appendix filed with the Court of Appeals.

the indictment because he had been denied a speedy trial. That motion was denied without opinion.

The government's proof at trial consisted almost entirely of the testimony of the two Narcotics agents.[4] Both agents testified that they had come to petitioner's office on April 30, 1965, to interview Miss Muriel Block, and that at the conclusion of Miss Block's interview, Agent Ivan Wurms asked petitioner about the $30,000 collateral used to obtain Romano's bond. According to the agents—who were testifying about conversations that had occurred almost seven years before the trial—petitioner told them that he had received a telephone call from David Markowitz, Romano's New York lawyer, advising that $30,000 would be delivered by messenger, and that the $30,000 had thereafter come by an unknown messenger. According to the agents, petitioner said he took the $30,000 to Romano at the District of Columbia jail and was told to sign a receipt and to give the money to the bondsman. The agents also said that petitioner told them he had a receipt and could produce it if necessary.

Petitioner testified in his own defense and presented several reputation witnesses. His testimony was, in essence, that he had tried to convey to the grand jury

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[4] The prosecution also called the deputy forelady of the grand jury before which Rosenberg had testified, and David Markowitz, the lawyer who, according to the agents' report of their conversation with Rosenberg, was said by Rosenberg to have called him and told him that the $30,000 was being sent to Washington by messenger. Markowitz denied ever having had such a conversation with Rosenberg. (This testimony was, of course, consistent with Rosenberg's testimony to the grand jury and with the substance of his first allegedly perjurious answer—*i.e.*, that he would not have told the agents about Markowitz' phone call because the conversation never took place.)

"at least sixteen times that I had no recollection of any conversation concerning the $30,000 with the agents" and that the answers specified in the indictment were meant to explain why he believed that he would not have made such statements to the agents.

After four days of trial and some eight hours of deliberations, the jury reported that an impasse had been reached.[5] The jury was dismissed for the weekend, and resumed deliberations on Monday morning after receiving what the District Judge referred to as a "mild Allen charge." At 5:20 p.m., the jury returned a guilty verdict.

REASONS FOR GRANTING THE WRIT

This Court recently had occasion to review and reverse a decision of the Court of Appeals for the Second Circuit which had overbroadly applied the federal perjury statute, 18 U.S.C. § 1621. In *Bronston* v. *United States,* No. 71-1011 (decided January 10, 1973), a unanimous Court, relying upon authorities as disparate as Dean Wigmore and Montesquieu, concluded "that the perjury statute is not to be loosely construed." The Court of Appeals for the Second Circuit had, however, summarily affirmed petitioner's conviction before its "loose construction" of Section 1621 was overturned by this Court. And the facts of this case—spelled out in detail in our Statement and disclosed by even a casual reading of petitioner's full grand jury testimony—support a criminal conviction only on an expansive

[5] The jury inquired, at one point in its deliberations, whether it had to find that petitioner lied in all five answers to enter a guilty verdict. The judge replied that falsity "with respect to any one of his answers" would be sufficient, without also instructing that the jury would have to agree unanimously that the particular answer was false.

view of the perjury statute. This Court should grant certiorari and either reverse the judgment below on the authority of *Bronston* v. *United States,* or, at the least, remand this case for further and fuller consideration.

1. As the portions of petitioner's grand jury testimony quoted in our Statement plainly reveal, the indictment lifted certain of his answers out of context to make it appear that he unqualifiedly *denied* making certain statements, whereas in fact his testimony was that he *did not remember* making any such statements. The prosecution neither charged nor proved that petitioner *did* remember making those statements; it proved at the most only that the statements *were made.*[6]

The rule is well established that " a charge of perjury may not be sustained by the device of lifting a statement out of its immediate context and thus giving it a meaning wholly different than that which its context clearly shows." *Fotie* v. *United States,* 137 F.2d 831, 842 (8th Cir. 1943). Accord, *Van Liew* v. *United States,* 321 F.2d 674, 677-678 (5th Cir. 1963). Yet the Court of Appeals for the Second Circuit, by its decision in this case, and a divided Court of Appeals for the Ninth Circuit, by its very recent decision in *United States* v. *Cook,* 468 F.2d 1164 (1972), have emasculated this salutary rule by holding that issues of the true meaning of the questions and answers quoted in the indictment are for the jury, and "all the reasonable inferences supporting the verdict are in favor of the government." *Id.* at 1168, 1170.

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[6] On this point, see *Fotie* v. *United States,* 137 F.2d 831, 842 (8th Cir. 1943), holding that where a defendant is charged with perjury in testifying that he *did not remember,* "something more is necessary to convict than proof that the act, not remembered, did in fact occur."

The decision below, as well as the Ninth Circuit's recent ruling in the *Cook* case—to which Judge Ely vigorously dissented (see 468 F.2d at 1176-1178)—conflict with the rule in the Eighth Circuit, as applied in *Brown* v. *United States,* 245 F.2d 549 (8th Cir. 1957). In the present case, as in *Brown,* the events which preceded the alleged perjurer's crucial appearance before the grand jury—*i.e.,* the fact that he had been called on six different occasions over a period of less than two months and never once asked about his conversation with the Narcotics agents—demonstrated that the sole purpose of calling him to ask more questions was to ensnare him in a perjury charge. And the relentless series of questions that followed his repeated assertions that he did not remember the contents of his conversations with the Narcotics agents amounted to "bludgeoning" for the purpose of finally evoking an answer on which a perjury charge might be filed. In this case, as in *Brown,* the prosecutor's "purpose was simply to extract from defendant his testimony about the talk . . . knowing that his recollection of it differed from that of the others present, and to get him indicted for perjury." 245 F.2d at 555. And, as in *Brown,* "[t]he questions and answers in the indictment are taken out of context," because this petitioner, like the defendant in *Brown,* "made it plain in other answers that he had no distinct recollection of actual words used in the discussion" (which, like that in *Brown,* was a conversation in which his attention was directed to subjects other than his own statements). *Ibid.*

These are substantial reasons of policy to limit perjury prosecutions of this kind. In the first place, to sustain a conviction under these circumstances encourages misuse of a grand jury, and "bludgeoning" of a witness, by the technique of "repeating and rephrasing

the same question, thus creating more possible perjury counts," and "enabling the prosecution to choose the most detrimental responses to identical questions as the bases for a charge of perjury." *United States* v. *Cook, supra,* 468 F.2d at 1176, 1177 (Ely, J., dissenting); see *Gebhard* v. *United States,* 422 F.2d 281, 289-290 (9th Cir. 1970).

In the second place, a permissive rule leaving all such questions to the jury permits convictions to be based on charges neither pleaded nor proven. The danger is well illustrated in this case. For while petitioner was concededly neither charged with nor proved guilty of lying when he said he did not remember, the prosecutor and the trial judge nevertheless asked the jury to consider this issue. In his summation, the prosecutor stated (Tr. 363-364):

> " 'I don't remember' isn't a tricky phrase, it is a very simple phrase. If a man says 'I don't know' and he doesn't remember, that is the truth.
>
> "If a man says, 'I don't remember,' and he does remember, that is a lie."

And in his charge to the jury, the trial judge also said (Tr. 405):

> "And so, to say 'no' under oath when the sworn witness knows full well that the truth calls for 'yes,' or vice versa, is perjury. As to 'I don't remember,' that is equally false if the witness actually knows that the truth calls for a certain answer."

These admonitions could only have confused the jury into believing that it could convict if it found petitioner's answers not charged in the indictment to have been false; yet petitioner was not defending against any such charge.

2. In upholding the District Court's denial of petitioner's motion to dismiss the indictment on the ground that he had been denied a speedy trial, the Court of Appeals misapplied this Court's decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972), in such a way as to call for the exercise of this Court's supervisory power.

Six full years elapsed between the date of the indictment and petitioner's trial, a year longer than the delay which this Court in *Barker* termed "extraordinary." 407 U.S. at 533. The delay substantially prejudiced the petitioner because the government's case turned largely on what the Narcotics agents could recall of their conversation with the petitioner in April 1965. Their testimony established that they had no substantial present recollection, but that they relied on a report that they had written in May 1965 and on grand jury testimony given when the appellant was indicted. Appellant was not convicted, therefore, on present recollection but on documents and old testimony not subject to cross-examination.[7]

Furthermore, petitioner clearly did not "waive" the right to a speedy trial. He moved to dismiss the indict-

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[7] The prosecutor in summation used the delay to his advantage in attempting to rehabilitate his witness's testimony (Tr. 370):

> "He came up to testify about the last page of that report, he knew what he was talking about. The other stuff, the first six pages, is part of a dead investigation that covered three days, some six years ago.
>
> • • • • •
>
> "Mr. Amster did a very good job of cross-examining him, and I want to compliment him on that. He showed he didn't remember all those irrelevant things about the three days. It doesn't help, doesn't help the defendant a bit. It shows he doesn't remember anything that is not important, that he has not bothered with over the six years."

ment (the equivalent of a request for speedy trial) almost four years before trial, and renewed the motion in October 1970—still more than a year prior to trial.

Under these circumstances, the Court of Appeals could have rejected petitioner's claim under the "balancing test" of *Baker* v. *Wingo, supra,* only by finding that the delay was for some reason "justifiable." But the record reveals that the greater part of the six years' delay was attributable to a single unjustifiable default by the government—its failure, over a period of four years, to comply with an order by the trial court directing that certain discovery be provided to the petitioner. Not until July 1969 did the prosecution furnish the bill of particulars called for by the court's order of June 1, 1967, and the other two items were not furnished until December 2, 1970—after the defense had moved to dismiss the indictment for denial of a speedy trial, and three and one-half *years* after the discovery order was entered.

In ruling on petitioner's motion to dismiss the indictment, the District Judge was "at a loss to understand the inordinate time [the government] permitted to pass," and concluded that the government's delay was "inexcusable" (Appendix C, pp. 2a-4a, *infra*). Nevertheless, the judge denied the motion without discussion, apparently believing that setting a fall 1971 trial date and ordering certain additional discovery was an adequate remedy for the delay in bringing the case to trial. This was clearly error; for "the only possible remedy" that will vindicate a defendant's right to a speedy trial is dismissal of the indictment. *Barker* v. *Wingo, supra,* 407 U.S. at 522.

We know of no federal case in which a delay of six years between indictment and trial has been held pro-

per under the Sixth Amendment. In this case there are the additional facts that the petitioner was convicted largely on the basis of a six-year old report of a government agent as to which he had little independent recollection at the time of trial, and that much of the delay is attributable to "inexcusable" conduct by the government. Under these circumstances, if the "balancing test" of *Barker* v. *Wingo* is to prove an effective guarantee of the right to a speedy trial, we submit that it must compel reversal of the decision of the Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of November one thousand nine hundred and seventy-two.

Present: HON. J. JOSEPH SMITH, HON. IRVING R. KAUFMAN, HON. WILLIAM H. MULLIGAN, Circuit Judges,

72-1579

UNITED STATES OF AMERICA *Plaintiff-Appellee,*

v.

HARVEY ROSENBERG, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREFORE, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth

day of November, one thousand nine hundred and seventy-two.

Present: Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. William H. Mulligan, Circuit Judges,

72-1579

United States of America, *Plaintiff-Appellee,*

v.

Harvey Rosenberg, *Defendant-Appellant.*

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is Ordered that said petition be and it hereby is Denied.

A. Daniel Fusaro
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Cr. 860

Memorandum

United States of America
-against-
Harvey Rosenberg, *Defendant.*

Irving Ben Cooper, D. J.

It would serve no useful purpose by a recital of the details of many unnecessary steps and counter steps heretofore taken by the parties. Suffice it to say that much time has been wasted by both sides—by the defendant in renewing requests for substantially identical relief previously considered and disposed of; by the Government in a

clear failure within a reasonable time to comply with our order of June 1, 1967 (we are at a loss to understand the inordinate time it permitted to pass; even at this late hour it offers no satisfactory reason).

In disposing of the applications now before us, we note with particularity (1) defendant's motion originally filed March 21, 1968 seeking to dismiss the October 27, 1966 indictment for failure by the Government to comply with our order of June 1, 1967 and renewing a variety of requests for discovery and other relief previously disposed of, (2) the very large number of adjournments by consent, (3) a stipulation of May 8, 1968 (signed by both parties) marking the motion off the calendar pending restoration upon ten days notice, and (4) defendant's motion for dismissal because the period of time that has elapsed since indictment constitutes a denial of the right to a speedy trial. We dispose of the two motions as follows:

March 21, 1968 motion

(1) Defendant's request to dismiss the indictment for failure by the Government to comply with our order of June 1, 1967 is denied. The directed bill of particulars was filed on July 8, 1969. The Government recites in its Affidavit in Opposition, p. 3, that it will complete its obligation by serving "on defense counsel copies of all documents called for by the decision of this Court" before December 2, 1970.

We are satisfied with the Government's assurances of statements by the "investigators in charge of the pre-indictment investigation" that there was no wiretap or electronic surveillance in any way relating to this matter.

(2) In view of the substantial delay in bringing this case to trial, we conclude that the interests of justice would best be served by granting defendant's application for discovery of testimony of the two Federal Bureau of Narcotics agents before the Grand Jury that returned the pending

indictment—however, only to the same extent permitted by Judge Weinfeld's order of June 15, 1966 in respect of the testimony of these same agents before the April 1965 Grand Jury.

(3) We reaffirm our denial of defendant's request for discovery of the Grand Jury testimony of Block and Markowitz for the reasons set forth in our order of June 1, 1967.

(4) Defendant's request for those portions of the memorandum report of Wurms and Worden, dated May 6, 1965, not ordered disclosed by Judge Weinfeld are denied.

(5) Defendant's request that this Court examine the "grand jury proceeding relating to defendant" is denied. Government's Reply Affidavit, November 10, 1970, p. 2-3.

(6) The Government shall bear the cost of discovery and for all material included in sections 1 and 2 of this order.

November 2, 1970 motion

Defendant's motion to dismiss for failure by the Government to diligently prosecute is denied. See *United States* v. *Borman,* Dckt. No. 34226 (2d Cir. January 18, 1971); *United States ex rel. Solomon* v. *Mancusi,* 412 F.2d 88 (2d Cir.), cert. denied, 396 U.S. 958 (1969).

In light of what we regard as inexcusable delay on the Government's part (referred to above), and for the reasons set forth in the papers submitted in behalf of defendant, we accede to the request that we set a trial date for the fall of 1971.

So Ordered:

New York, N.Y.

February 8, 1971

/s/ Irving Ben Cooper
United States District Judge

APPENDIX D

[Excerpt from Grand Jury Testimony of Harvey Rosenberg, July 14, 1965]

Q. What were the circumstances when Miss Block received the subpoena? Did she receive it in your office? A. [Nods]

Q. Who else was present, do you recall? A. Two FBI men. Two Federal Bureau of Narcotics agents.

Q. Do you remember their names? A. If you mention it, I'll tell you. I know one of them. He's in an assigned criminal case. He was the agent that I had in all my—this is the only criminal case I ever got paid for, I think. Maybe one or two more. And the assigned criminal case, he was the agent, so I knew who he was.

Q. Did they interview Miss Block on this occasion? A. Yes sir.

Q. One of the agents named Warden? A. No sir, that I don't remember. Is he the—there's a red-headed fellow, I think. Irving something.

Q. How about Agent Peterson? A. No. Peterson doesn't —what was Warden's first name?

Q. Gary G. A. No sir, that doesn't strike a note.

Q. And I take it that these agents questioned— A. The same agent who called her immediately after the last time we were in Court. On the 21st of June, I believe.

Q. What did the agent tell her at that time? A. I don't know. She told me the agent called her.

Q. Did she tell you what he said? A. I think that would be privileged.

Q. What the agent told your client is privileged because you represent the client? A. She told me something, and I—I'm not sure that—you know, it's 25th order of something or other. Do you want to know what she told me the agent said? The agent told her that I put her in the soup.

Q. That's all? A. That's all she told me.

Q. Did the agents discuss with you on this occasion the

thirty-thousand-dollar bond that was posted? A. I don't recall whether they did or not.

Q. You don't remember? A. They didn't come to see me. They came to sit in my office while talking to her.

Q. That was at your request, I take it, they came to your office? A. Miss Block requested and said she would make a statement to them, she would answer the questions, if I was present, or some lawyer of her choosing, which was me.

Q. Do you recall what the questioning of Miss Block concerned? A. I have no notes on it.

Q. That wasn't my question. Do you recall— A. I don't recall. I remember vaguely some things, but—I—

Q. What are those things that you vaguely— A. She took trips, that's all.

Q. That's all you remember? A. That's all I remember.

Q. Did you discuss with your client, before the agents came, what her answers would be or what the subjects of inquiry might be? A. I discussed—not the subject of inquiry, because I didn't know what the subject of inquiry was—I discussed, generally, with my client her problem.

Q. And did that problem concern the thirty-thousand-dollar cash bond posted for Mr. Romano? A. Not at that time, it didn't.

Q. Do you recall whether, in the conversation between the agents and Miss Block, the subject of the thirty thousand dollars came up? A. No, I don't. I really don't.

Q. You don't recall that? A. [Shakes head]

Q. Do you recall whether you would have told the agents anything about the thirty thousand dollars? A. If I knew anything.

Q. If you knew it, would you have told them? A. If it would help them, I would have. I'm sure I would have. If it would do any good, I would help, and if it didn't violate an attorney-client privilege.

Q. Did the agents, do you recall, ask you about the thirty thousand dollars? A. I don't recall Mr. Tend—Mr. Ober-

maier—I really don't. The only thing I recall is this—and I thought his name was Irving. He's a big ruddy-faced fellow. He said something about, "Well, after all, you're assigned criminal cases, you got a big one." I expect he was talking about Mr. Romano.

Q. And, in response to that, what did you say? A. Nothing.

Q. Absolutely nothing? A. Not that I recall. I remember laughing.

Q. Well, you've told this Grand Jury that you had no personal knowledge prior to June 17 of the source of the thirty thousand dollars,— A. Yes sir.

Q. —circumstances surrounding the receipt thereof, is that right? A. Yes sir.

Q. Did you tell the agents that you had no personal knowledge of the thirty-thousand dollars? A. I don't think they asked me any questions about the thirty thousand dollars. I don't remember any.

Q. If they had asked you questions, do you think you might recall? A. I might recall the questions? Or—

Q. Or the fact that they asked you about the thirty thousand dollars. A. I don't know, Mr. Obermaier.

Q. But you have no present recollection? A. No, because they didn't come to talk to me, and my whole reason for being there was to assist Miss Block, and that was the only reason I was there, to act as her counsel and allow her to say anything that would aid them and not injure Miss Block.

Q. Did you dictate any memoranda after this conference between Miss Block and the agents and yourself? A. No sir. As a matter of fact, most of the conversation went to—well, Miss Block said,— you know all these things anyway, and that was the sum and substance.

Q. But you made no office notation? A. I made no office notation, sir.

Q. Would there be an office notation as to when the conference was? A. No. It may be in my diary, you know.

I can find out who the agent is, but I'm sure you know better than I do.

Q. Was it Agent Wurms? A. Wurms.

Q. First name, Ivan. A. Ivan. See, Irving and Ivan are pretty close. I knew the other two names did not sound familiar. There was another tall, lanky fellow with them, but I don't know his name, never saw him before. Wurms has been on the stand when I questioned him with regard to assigned criminal case. He's the one that made the statement to me.

Q. And you recall nothing in the conversation between Wurms and yourself, concerning the thirty thousand dollars? A. No sir. I really don't.

Q. Would it refresh your recollection any if I told you that that interview was conducted on April 30, 1965? A. Wouldn't refresh it, but it's probably the dates if you tell me it is.

Q. It was on that date or immediately prior thereto that you were retained by Miss Block? A. It was the date—and I've consistently told you this—it was the date that she got called by the Federal Bureau of Narcotics agents and then, with regard to the Grand Jury matter, she was handed two subpoenas and she asked me to represent her on that date. I thought it was in May. Now when did she appear in the Grand Jury? Maybe—we're talking about the date? May 12th? 13th? Sometime when she went to the Grand Jury.

Q. Did you represent her before the District of Columbia Grand Jury? A. One of my partners; I was engaged in a trial; I was engaged in a trial in another jurisdiction.

Q. Well, the subpoena was received at the time you had the conversation, returnable at some future date? A. Right.

Q. When you testified that you had no personal knowledge as to the source of the $30,000, that testimony, I take it, was true, when you gave it here in the Grand Jury? A. Mr. Obermaier, everything I say is true.

Q. Well, between the time that Miss Block was interviewed by the Federal Bureau of Narcotics agents, and the time you gave that testimony, did you acquire any personal knowledge as to the source of the $30,000? A. No, sir. Now, up till—up till that Thursday morning, now.

Q. I'm talking about the time you gave the testimony before this Grand Jury and Judge Cannella that you found the brown paper bag on your desk? A. No, sir; no, sir.

Q. Did you know any more about the $30,000 when the agents interviewed Miss Block than you did at the time you gave your testimony? A. No, sir.

Q. So that at the time you were interviewed by the agents you had no personal knowledge as to the source, or how you obtained the $30,000? A. No, sir.

Q. None whatsoever? A. No.

Q. So that even if you wanted to be helpful to the agents, you couldn't have told them anything, I take it? A. Nope.

Q. Absolutely nothing? A. Nothing; nothing.

Q. Did they ask you about the $30,000, and did you say, "I don't know anything about it"? A. I told you, Mr. Obermaier, they were not asking me anything.

Q. About—? A. About nothing.

Q. They asked no questions of you at all? A. No, sir.

Q. None whatsoever? The only conversation between you and Agent Wurms was that he said something to you about your assigned cases, "and now you've got a big one"? A. "Now you're representing a big one"—something to that effect. And he said to me something about, "Now we're going to get"—"we're going to get Mr. Markowitz." Now, why he said it, I don't recall. He said something like that.

Q. But the agents asked you nothing about the $30,000? A. Not to my recollection, they didn't. They didn't come to talk to me. They came to talk to Miss Block.

Q. That's not what I'm asking you. A. I don't recall anything about the $30,000 ever being asked me.

Q. But at the date that Miss Block was interviewed, you had no more knowledge about the source—of how you obtained the $30,000 than you did when you testified before the Grand Jury, is that right? A. No, sir.

Q. And you certainly wouldn't have given the agents any false testimony, or false information, would you? A. No, sir; I would not.

Q. Did you tell Agent Wurms that you received a telephone call from Markowitz concerning the $30,000? A. I don't recall any such conversation.

Q. Well, would such a conversation have been had between you and Wurms, that you—? A. I doubt it.

Q. You know you had no personal knowledge as to how you obtained the $30,000? A. That's right, sir.

Q. Didn't you tell Agent Wurms that Markowitz, during the telephone conversation, told you that he was sending down $30,000 by messenger? A. No, because that's not what happened.

Q. You didn't tell the agent that? A. [Shakes head, no.]

Q. Is there any doubt in your mind that you had no such conversation, even approaching that subject? A. I don't recall any such conversation, Mr. Obermaier. Anything would be possible, but that did not happen. Mr. Markowitz did not, to my knowledge, and even to my present knowledge,—well, now,—you're getting—

Q. Well, did you tell the agents that Markowitz called you? A. Did I tell the agents Markowitz called me?

Q. And told you that he was sending down $30,000 in cash? A. I don't think so. I don't know. I don't recall any such conversation.

Q. Well, no such conversation would have been possible, because that isn't the way it happened, according to your testimony, is that right? A. It didn't happen that way; that's right. I found that out subsequently.

Q. Then you wouldn't have given the agents any false information? A. Not intentionally, I didn't give anyone

any false information. I didn't give the agents any information.

Q. Between the time Miss Block was interviewed, and the time you testified initially before the Grand Jury, — A. Uh huh.

Q. —did you tell the agents that the messenger did come down and that you went to Romano in the District jail, and asked him what to do with the $30,000? A. No, I don't recall any such conversation.

Q. Did you tell the agents that you took a receipt for $30,000 down to Romano and asked him who he wished to have sign the receipt? A. Who he wished to have sign the receipt?

Q. Did you talk to Romano about the receipt of the $30,000? A. Did I? I think that's privileged communication.

Q. Did you talk to the agents about that? A. Not to my knowledge. I wouldn't tell them anything that's privileged.

Q. That didn't happen that day, I take it? A. Now you're asking me to tell you about a privileged communication.

Q. I don't think so. A. You're asking me did I say something to Mr. Romano about a receipt?

Q. I'm asking you if it happened that way? A. What way?

Q. If you had a conversation with Romano about the receipt of the $30,000. A. I think that's privileged.

Q. Well, you certainly weren't acting in an attorney's capacity with respect to the $30,000. A. Well, look, first of all, the facts are, when I got the $30,000, I called the bonding company and I got Mr. Romano out, so I certainly wouldn't have gone down to the jail with the $30,000.

Q. That's not my question; not even close to my question. I asked, did you go down to Romano with respect to a receipt for the $30,000? A. No, sir.

Q. Did you tell the agents that you went down to the District jail to talk to Romano about a receipt for the

$30,000? A. Not to my knowledge, because it never occurred—

Q. Did you tell the agents that Romano told you that you should sign the receipt for the $30,000 and give it to Senge? A. No, sir, because I wouldn't be signing a receipt for $30,000 I gave away.

Q. You wouldn't be signing a receipt for $30,000 you gave away? A. If I give you $30,000, Mr. Obermaier, I wouldn't give a receipt for $30,000; you'd give me a receipt.

Q. And wouldn't the person to whom you gave the $30,000 issue a receipt to you? A. Normally they would.

Q. Did they, in this instance? A. Nobody's got a receipt from me.

Q. Did you tell the agents that you signed a receipt for the $30,000? A. No, sir.

Q. Did you tell the agents that you could produce that receipt, if it was necessary? A. No, sir; there is no such receipt.

Q. No such receipt at all? A. No, sir.

Q. You didn't sign a receipt for the $30,000? A. No, sir.

Q. You didn't tell the agents that you signed a receipt for the $30,000? A. You know,—I don't know what the agents have said, but I did not discuss this matter with the agents.

Q. At all? A. No; my recollection, no. And I could not have told them that there was a receipt, because there is no receipt.

Q. And you could not have told them that you went down to Romano in the District jail, to discuss the $30,000 receipt, did you? A. No, sir, because I got Mr. Romano out within six hours of having received the money. I didn't go to the jail.

Mr. Obermaier: Would you ask the witness to step outside for a minute?

Foreman: Kindly step aside. (Witness leaves room and is recalled)

Q. Mr. Rosenberg, you're still under oath. A. Yes.

Q. Did Mrs. Romano furnish you any information about the $30,000? A. With respect to how I got it?

Q. Yes? A. No, sir.

Q. The only—well, did Mrs. Romano's sister furnish you with any information? A. No, sir.

Q. The only client whom you've spoken to, and who furnished you information is Muriel Block? A. Yes, sir.

Q. The only source of that information which you now possess was your conversation with Miss Block on June 13, 1965? A. Yes, sir.

Q. Did you have any telephone conversations with Markowitz concerning the $30,000? A. When? If you're talking about subsequent to the—you're asking me about the $30,000? Yes, I did have a conversation.

Q. How about in July of 1964? A. Only conversations that I had was, if I recall having any, they were with respect to, we needed $30,000 for bond, but I don't— You see, I don't recall calling Mr. Markowitz about the thing. I really don't. I don't know whether Mrs. Romano called. I know she called once from my office.

Q. Mrs. Romano in your presence called Mr. Markowitz? A. On one occasion. I don't remember what.

Q. Did her conversation deal with the $30,000? A. I don't recall. I mean, I am sure that Mr. Markowitz knew that we required $30,000 for bail—I mean, for collateral.

Q. Did he personally convey that conversation to you? A. I don't have any independent recollection.

Q. Do you have any kind of recollection concerning Mr. Markowitz indicating to you with reference to the $30,000? A. I don't have any independent recollection.

Q. Do you have a dependent recollection? A. No, independent or dependent.

Q. Did you tell Agent Wurms that you had such a conversation? A. I have no recollection about a conversation with Agent Wurms about the $30,000. I have absolutely no recollection about it at all because the only reason he was in my office was to talk to Miss Block.

Q. You have no recollection that you had this conversation? A. My testimony is I have no recollection of it whatsoever.

Q. Would such a conversation have been possible? A. Is that a question, Mr.—

Q. I think it is, yes, Mr. Rosenberg. A. I think anything in the world is possible.

Q. If such a conversation has taken place, you would certainly have given false information to the agents, I take it. A. Mr. Obermaier—

Q. Yes. A. I resent the question, and is that a question, that I would give false information to the agents?

Q. I am saying, you have no independent recollection of speaking to Agent Wurms, I take it, about the $30,000? A. No, sir.

Q. And your conversation with Markowitz concerning the— A. No, sir, other than what I have told, that I knew Markowitz knew there was $30,000 required for the bond; at least, I am pretty sure $30,000 was required as a collateral. I have no independent recollection of any conversation with Mr. Wurms.

Q. Do you have any independent recollection of having a conversation with Wurms? A. With Wurms?

Q. Yes. A. Sure. He was sitting in my office.

Q. Well, tell us the sum and substance of the conversation. A. The only recollection I have of the conversation is, he asked me a lot of questions and I think questions which I don't think Miss Block should answer. I don't think there were any on that occasion I had told her not to answer and she answered the questions and then we had this jovial conversation or jocular conversation, I guess it would be, of his statement about, now you are refusing, or on that occasion, you represent— The import was, it wasn't an assigned criminal case.

Q. Did you tell him how much money you had made, what your fee was for Romano, for representing him? A. I have no recollection doing that.

Q. Do you have any more recollection that what you have already told us about the conversation with Agent Wurms? A. I have no other, other than the questions that were propounded to Miss Block and it wasn't asking me any questions, because I wasn't there to be asked any questions. We had—

Q. Do you recall any questions being asked of you? A. I don't recall any questions being asked of me. I remember a jocular conversation and the conversation that I told you about Mr. Markowitz.

Q. Is there anything in the testimony before this Grand Jury that you wish to change at this time? A. I don't know of any testimony that I have given this Grand Jury that is not true. I just don't recall the conversations with Mr. Wurms respecting me, because I just don't recall anything about that. Everything I have told this Grand Jury is true.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1051

HARVEY ROSENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on November 13, 1972. A petition for rehearing was denied on November 29, 1972 (Pet. App. 1a-2a). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to January 29, 1973, and on that day the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the jury could reasonably find that, taken in context, petitioner's responses to questions put to him before a grand jury constituted perjury.

2. Whether the indictment should have been dismissed on the ground that petitioner was deprived of his Sixth Amendment right to a speedy trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on a one-count indictment charging him with having committed perjury before a grand jury. He was sentenced to a suspended term of one year's imprisonment. The conviction was affirmed by the court of appeals without opinion.

1. In July 1964, petitioner, an attorney, had represented one Allie Romano in removal proceedings in the United States District Court for the District of Columbia following Romano's arrest in that district on a warrant issued in the Southern District of New York charging narcotics violations. In connection with this representation, petitioner had given $30,000 to a bail bondsman to effectuate Romano's release on bond. Romano subsequently failed to appear for trial in the Southern District, and the Bureau of Narcotics and Dangerous Drugs commenced an investigation to ascertain his whereabouts.

In the course of this investigation, bureau agents contacted one Muriel Block, a friend of Romano's and a former employee of petitioner. Miss Block requested that she be interviewed at the office of petitioner, who

was her attorney, and the interview took place on April 30, 1965. After completing their inquiries of Miss Block, the agents questioned petitioner concerning the source of the money used to effectuate Romano's release on bond. Petitioner informed them that he had received a telephone call from Romano's New York attorney, who said $30,000 in cash would be sent to him by messenger; that the money had arrived and he had visited Romano in the District of Columbia jail for further instructions; that Romano had instructed him to sign the receipt for the money and deliver the money to the bondsman; that he had done so and Romano had been released on bond that night; and that he had the receipt and could produce it if necessary (A. 258–265, 297–301).[1]

Petitioner was thereafter called before a grand jury in the Southern District of New York which was investigating Romano's disappearance. At the July 14, 1965, session, he was specifically asked about his conversation with the narcotics agents. At first he stated merely that he had no recollection of being asked about the money by the agents (A. 154–159; Pet. 5–6; Pet. App. 7a–10a). Under further questioning, however, he denied outright having made statements to the agents which the evidence showed he had in fact made (A. 159–162; Pet. 6–8; Pet. App. 10a–12a). The indictment (A. 5) was based upon five such denials:

> Q. Didn't you tell Agent Wurms that Markowitz, during the telephone conversation, told you that he was sending down $30,000 by

[1] "A." refers to the appendix in the court of appeals, a copy of which we are lodging with the clerk of the Court.

messenger? A. No, because that's not what happened [A. 159; Pet. 6; Pet. App. 10a].

* * * * *

Q. Did you tell the agents that you went down to the District jail to talk to Romano about a receipt for the $30,000? A. Not to my knowledge, because it never occurred——

Q. Did you tell the agents that Romano told you that you should sign the receipt for the $30,000 and give it to Senge? A. No sir, because I wouldn't be signing a receipt for $30,000 I gave away [A. 161; Pet. 7–8; Pet. App. 11a–12a].

* * * * *

Q. Did you tell the agents that you signed a receipt for the $30,000? A. No, sir.

Q. Did you tell the agents that you could produce that receipt, if it was necessary? A. No, sir; there is no such receipt [A. 162; Pet. 8; Pet. App. 12a].

2. A two-count perjury indictment was returned against petitioner on January 20, 1966 (A. 23, 32–38). Following various procedural moves initiated by the defense (A. 23–25), the government on September 6, 1966, filed a *nolle prosequi* on that indictment (A. 25). The instant one-count indictment was returned on October 27, 1966 (A. 1, 4–6). Petitioner's plea of not guilty was entered on November 21, 1966, and on January 3, 1967, he filed motions for dismissal, for discovery and inspection, for a bill of particulars, and for disclosure of any unlawful electronic eavesdropping which may have led to the indictment (A. 1, 7–12). On June 1, 1967, the motion to dismiss was denied, the motion for discovery was partially granted and partially denied, and the motion for a bill of

particulars was granted to the extent consented to by the government (A. 1).

On March 22, 1968, after the government failed to serve a bill of particulars or to make an electronic eavesdropping disclosure, petitioner moved for dismissal of the indictment and for other relief (A. 1, 195–196). Argument on the motion was adjourned by several successive stipulations (A. 2);[2] the last stipulation, filed May 13, 1969, adjourned the motion until October 1969 and provided that the case would not be placed on the trial calendar until 60 days after both service of the bill of particulars and decision on petitioner's motions (A. 2, 205).

The bill of particulars was served on July 8, 1969 (A. 206, 209) and filed 11 days later (A. 2). No further action was taken by either party for approximately a year. On August 31, 1970, the government notified petitioner's counsel by letter of its intent to move the case for trial during the fall of 1970 and inquired whether any further procedural steps were necessary prior to the commencement of trial (A. 215–216). On October 26, 1970, petitioner responded by moving for

[2] On the same day that the motion to dismiss was filed, petitioner's counsel wrote to the United States attorney confirming their understanding of that day that the motion was to be adjourned until May 6, 1968, and that the case was to be postponed from the trial calendar of March 29 to that of September 17, 1968. Counsel also advised that he was involved in another case—*United States* v. *Coffin, et al.*—which, if it came to trial, would have to take precedence (A. 238). The *Coffin* case was tried in May and June of 1968; counsel filed his appellate brief in the case at the end of November of that year and argued the appeal on January 7, 1969. See *United States* v. *Spock*, 416 F. 2d 165 (C.A. 1).

the first time to dismiss the indictment for failure to prosecute (A. 210). In an accompanying affidavit, it was represented that, due to other commitments, petitioner's counsel would not be available for trial until the fall of 1971 (A. 213); petitioner's reply affidavit to the government's opposition to his motion to dismiss asserted that "the only proper alternative" to dismissal of the indictment "would be to set the trial down for November 1971, when [counsel] will be available to try it" (A. 229).

By order dated February 8, 1971, the district court denied petitioner's motion to dismiss, but acceded to his request that a trial date be set for the fall of 1971 (A. 234; Pet. App. 4a). The court found that "much time has been wasted by both sides—by the defendant in renewing requests for substantially identical relief previously considered and disposed of; by the Government in a clear failure within a reasonable time to comply with our order of June 1, 1967" (A. 231; Pet. App. 2a–3a).[3]

On May 28, 1971, the government informed petitioner that it was ready to try the case any time after June 15 of that year; at a calendar call on June 25 the government again announced that it was ready for trial, and the court set the trial for January 24, 1972, a date to which petitioner agreed (A. 240). Petitioner, having substituted himself for his original counsel (who had withdrawn) on July 7, 1971 (A. 2), moved *pro se* on December 22 of that year for a continuance

[3] The court also noted that it was satisfied with the government's assurances that there was no wiretap or electronic surveillance in any way relating to the case (A. 232; Pet. App. 3a).

of the January 24, 1972, trial date; the motion was denied (A. 2). On January 13, 1972, petitioner—having retained new counsel—moved to dismiss the indictment on the ground that he had been denied his right to a speedy trial (A. 235). The motion was denied, and the case proceeded to trial on January 25, 1972 (A. 3).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 12–13) that the court of appeals, in affirming his conviction, "overbroadly applied" 18 U.S.C. 1621 or adopted a " 'loose construction' " or "expansive view" of the statute. The recent decision in *Bronston* v. *United States*, No. 71–1011, decided January 10, 1973, upon which petitioner relies, involved only whether one could be convicted under the perjury statute for a statement "that is literally true but not responsive to the question asked and arguably misleading by negative implication" (slip op. 1). By contrast, the sworn statements for which petitioner was indicted and convicted were neither literally true nor unresponsive; rather, they were false, not by negative implication, but by affirmative assertion. Whereas the "testimonial mishap" in *Bronston* could easily have been cured by "a single additional question by counsel alert * * * to the incongruity of petitioner's unresponsive answer" (slip op. 6–7), the questions to which petitioner responded falsely here were plain and precise, and his answers, which were responsive and complete, did not call for additional questions to cure any possible "testimonial mishap."

Petitioner contends, however, that "the indictment lifted certain of his answers out of context" and that when the entire testimony is read, it is clear that he did not deny making statements to the agents but only disclaimed recollection of any such statements (Pet. 13). He also argues (Pet. 14–15) that his "relentless" questioning before the grand jury was a "'bludgeoning'" designed only "to ensnare him in a perjury charge." It is true that, in response to a number of specific questions concerning his conversation with the BNDD agents, petitioner denied recollection of his statements. It is equally true, however, that in response to the questions recited in the indictment he flatly denied making the statements to which they referred. It was precisely because his denials of recollection were considered possibly evasive by the attorney conducting the examination that additional questions were posed in an effort to bring out the truth. As this Court observed in *Bronston* (slip op. 7), "[i]f a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." The contention that the questions and answers charged in the indictment were taken out of context was properly addressed to and resolved by the jury, which was in a position to consider the entire transcript of petitioner's grand jury testimony (see A. 450, 462) as well as his explanation of the particular answers that were the subject of the indictment (A. 354–375).

The decision below does not conflict with *Brown* v. *United States*, 245 F. 2d 549 (C.A. 8), upon which

petitioner relies (Pet. 14). Unlike the situation here, the questioning in that case "had no tendency to support any possible action of the grand jury within its competency" (245 F. 2d at 555), and the statements upon which the perjury charge rested were so far out of context that they appeared to have "'a meaning wholly different than that which its context clearly shows'" (*id.* at 556).

There is, moreover, no basis for petitioner's claim (Pet. 15) that the court's instructions and the prosecutor's argument "confused the jury into believing that it could convict" on the basis of the answers, not charged in the indictment, in which he merely denied recollection. While the court pointed out that a false denial of recollection is as perjurious as an unqualified "yes" or "no" which is false (A. 443), it made clear that a conviction could be based only on one or more of the five unqualified answers charged in the indictment (A. 445–446, 451–452).

Nor did the prosecutor suggest that the jury could convict on the basis of petitioner's denials of recollection. In explaining why petitioner had been asked repetitive questions before the grand jury, the prosecutor argued that the interrogator had considered the denials of recollection to be evasive and had continued to ask questions until petitioner, when he realized that counsel was "not going to buy" a failure of memory (A. 441), responded with outright false statements (A. 434–435, 441). The prosecutor also argued that, if the jurors found petitioner's denials of recollection unbelievable, they should find that the unqualified answers for which he was indicted were also

false (A. 433).[4] This was proper argument which in no way implied that the jury could convict petitioner for false statements not charged in the indictment.

2. Petitioner also contends (Pet. 16–18) that, under standards enunciated in *Barker* v. *Wingo,* 407 U.S. 514, his indictment should have been dismissed because he was denied his Sixth Amendment right to a speedy trial. As the Court stated in *Barker,* there are four factors which must be weighed in determining whether the right to a speedy trial has been denied: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant" (407 U.S. at 530). Although six years elapsed between the indictment and the trial in this case, *Barker* does not require a dismissal of the indictment.

First, the government was not solely responsible for the delay. As the district court found (Pet. App. 2a–3a), both sides contributed to the delay. Moreover, all of the delay after August 31, 1970, when the government first notified petitioner of its intent to move the case to trial, was attributable to petitioner (see pp. 5–7, *supra*). The record does not reflect the reasons for that portion of the delay for which the government was responsible, but petitioner has not sug-

[4] That the prosecutor's comments could not have confused the jury is revealed by the statements made immediately following those quoted by petitioner (Pet. 15):

"If you find that the agents report is true and Rosenberg was just saying, 'I don't remember' because it is a convenient way of avoiding perjury, then you have found Harvey Rosenberg unbelievable and if you find him unbelievable when he says 'I don't remember,' how in the world can you believe him when he says 'No, I didn't discuss this with the agents'"! (A. 433.)

gested that the government intentionally delayed to gain a tactical advantage or to harass him (cf. *Barker, supra*, 407 U.S. at 531, n. 32).

Second, petitioner never asserted a right to be tried without delay. The right that he did assert, and not until the fall of 1970 after the government had indicated its readiness for trial, was to have the indictment dismissed.[5] Even that assertion was accompanied by a request for a further delay of one year in the event that dismissal was denied, and at the end of the year petitioner sought to postpone trial still further. Thus, here as in *Barker* the record "strongly indicates * * * that the defendant did not want a speedy trial" (407 U.S. at 536).

Finally, petitioner has not shown that the delay here was prejudicial to his defense. All that he can assert in that regard (Pet. 16) is that *government* witnesses—the narcotics agents—"had no substantial present recollection" of their conversation with petitioner. This may have weakened the prosecution's case, but it is difficult to see that it substantially prejudiced petitioner. Petitioner was at no time incarcerated, and no witness died or became unavailable during the pretrial period. Again as in *Barker*, any "prejudice was minimal" (407 U.S. at 534).

[5] Contrary to petitioner's assertion (Pet. 16–17), his March 22, 1968 motion to dismiss the indictment was not the "equivalent of a request for speedy trial." The motion was based on the government's failure to serve a bill of particulars and make other disclosures, not on its failure to notice the case for trial. After the bill of particulars was served, petitioner did nothing for a year; he was roused into activity only by notification that the government was ready for trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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